Federal Marijuana Law Enforcement Trends

Authored by: Allison M. O'Neil, David S. Szabo and Katherine A. Guarino

February 2017

The election of Donald Trump as President of the United States may lead to a significant change in the enforcement of the Controlled Substance Act (CSA) with respect to both medical and recreational uses of marijuana. Since 2013, the federal government's stance on enforcement of the CSA with respect to marijuana has generally been to allow states leeway to regulate medical and recreational use of marijuana. The federal government has limited prosecution to address certain enumerated enforcement priorities. However, the incoming Trump Administration has signaled that it may take a very different approach to marijuana enforcement.

To date, almost thirty states have legalized either medical or recreational uses of marijuana, but it remains illegal under federal law as a Schedule I controlled substance. Violation of the CSA by manufacturing, distributing, or possessing with the intent to distribute 100 kilograms or more of marijuana carries a mandatory minimum sentence of five years imprisonment. This prohibition takes precedence over any state law legalizing marijuana due to the Supremacy Clause of the U.S. Constitution.

While President Trump's views on the legalization of drugs have fluctuated, his nominee for attorney general is dedicated to eradicating marijuana use and distribution. Senator Jeff Sessions is a former federal prosecutor and Alabama attorney general who has been prosecuting marijuana dealers since the 1970s. His statements this past year have confirmed that his hard stance against marijuana legalization remains unchanged. Unless the President directs otherwise, Mr. Sessions is poised to upend the current policy against federal prosecution of state-regulated marijuana.

The so-called "Cole Memorandum," issued by Deputy Attorney General James M. Cole on August 29, 2013, represents the key guidance from the Department of Justice (DOJ) on marijuana prosecution.[1] The Memorandum lays out the enforcement priorities for federal prosecutors, which include preventing the sale of marijuana to minors, preventing the growing of marijuana on public lands, preventing the transfer of marijuana from a state where it is legal to a state where it is not, preventing the enrichment of drug cartels from the sale of marijuana, and preventing violence. The Memorandum states that historically, the federal government has relied on state and local law enforcement agencies to address marijuana activities through their own narcotics laws outside of the targeted federal priority areas. The Memorandum encourages strong deference to state law where a state regulatory system exists with respect to marijuana.

It is advisable, however, to keep in mind that the Cole Memorandum is merely guidance and lacks the force of law. The Memorandum concludes with an important caveat in this regard: neither the DOJ's guidance nor any state law or regulation provides a legal defense to a violation of federal law, including a violation of the CSA. Any threat to federal interests is at risk of prosecution, with conduct falling within the specific priorities carrying the highest risk of prosecution. This principle has been upheld by federal courts, i.e. that the federal government has the right to prosecute any violations of the CSA regardless of the Cole Memorandum and regardless of the state in which the crime occurs.

However, that power was recently checked with respect to medical marijuana prosecution. In August of 2016, the U.S. Court of Appeals for the Ninth Circuit ruled that a federal appropriations law prohibited the DOJ from spending money to prosecute federal marijuana violations by defendants who strictly complied with state guidelines permitting the sale of marijuana for medical purposes. One of the judges on the panel in that case warned that the medical marijuana industry should not feel immune from the federal prohibition because Congress is free to restore funding at any time and then prosecute retroactively individuals who committed offenses while the government lacked funding. If Congress decides to expand the spending ban to include recreational marijuana, the industry will gain further insulation from federal prosecution. However, rescission of the appropriations law with respect to medical marijuana would mark a serious departure from recent enforcement trends.

Other federal laws operate to prevent marijuana distribution and use. In February 2014, the DOJ issued guidance regarding prosecution of individuals and entities that engage in financial transactions involving proceeds from marijuana-related businesses. This guidance warns that selling marijuana remains a federal crime under the CSA, and thus anyone who invests in or provides services to a marijuana-related business may violate the federal anti-money laundering statutes. At the same time, it instructs prosecutors

to focus their limited resources on only the "most significant" marijuana-related cases in states, which have not legalized marijuana. The Financial Crimes Enforcement Network's guidance, issued simultaneously with the DOJ's, clarifies reporting obligations for transactions in the marijuana industry, which involve extensive due diligence and essentially continuous monitoring of the activities of any client or customer with a marijuana-related business.

For example, banks cannot accept proceeds from the sale of marijuana without running afoul of federal anti-money laundering laws. This makes business difficult for state-authorized marijuana organizations, which must pay their employees and withhold taxes, social security, and benefits on a cash-only basis. Investors in marijuana-related businesses also risk violating federal law, even in states where marijuana has been legalized. Investors located in states that do not allow the sale of marijuana risk criminal exposure under their own state's conspiracy, aiding and abetting, money laundering, and forfeiture statutes, as well, if they invest in or provide services to marijuana-related businesses, even if the marijuana-related business itself operates in a state that permits such sales. Similarly, marijuana consumers cannot use credit cards to purchase marijuana because it is a drug that is illegal under federal law.

Federal courts and those indicted for federal marijuana violations have criticized the Executive Branch's policy of inconsistently prosecuting federal marijuana laws nationwide. Allowing individuals in states that have chosen to regulate marijuana to escape prosecution at the expense of individuals in states that have not legalized marijuana, they argue, causes a disparate impact on users and distributors. Violations of federal marijuana laws committed in the almost thirty states that have legalized marijuana for medical use have generally escaped prosecution, at least since issuance of the Cole Memorandum in 2013. In the four states which have legalized recreational marijuana and currently have regulatory schemes in place, there were only three reported prosecutions[2] for violation of the federal prohibition against marijuana since the Cole Memorandum.

As United States attorney general, Mr. Sessions has the ability to revoke the Cole Memorandum and replace it with a much broader set of enforcement priorities, which would likely resolve the issue of disparate impact amongst the states, but could pose a serious threat to the retail marijuana industry. If this happens, marijuana prosecution will likely increase and may extend to conduct which did not fall within one of the priorities listed in the Cole Memorandum and which predated the revocation. While the federal government certainly cannot prosecute all instances of marijuana use due to limited resources, and likely would be less inclined to interfere directly with limited personal use and possession and medical marijuana, its prosecution of business owners at a high level could have a wide-ranging chilling effect on the entire retail industry. Businesses otherwise planning to enter the market might shy away due to a fear of prosecution and state legislators might delay implementation of new marijuana laws on the grounds of futility and the likelihood of causing confusion among citizens.

The Trump Administration seeks to change many existing federal policies, but the landscape for marijuana prosecution is far from clear. President Trump himself indicated during his campaign his preference that marijuana legalization be left to the states, but his choice for attorney general says otherwise.

In conclusion, we advise those who have not yet entered the marijuana market to exercise caution and consider the legal risks and uncertainties before taking action. For those who are already engaged in the market, we recommend careful, continuous monitoring of the developments in the DOJ, the Drug Enforcement Agency, and Congress with respect to the enforcement of federal marijuana laws, with the understanding that there are clear areas of risk in the absence of definitive guidance. We plan to monitor these developments closely.

Endnotes

1 *Two precursors to the Cole Memorandum were the memorandum issued by Deputy Attorney General Ogden in 2009, which acknowledged that some states had authorized medical use of marijuana and directed U.S. Attorneys to show prosecutorial discretion towards those states, and the 2011 memorandum by Cole affirming that guidance.*

2 *These prosecutions were brought in the U.S. District Court for the Districts of Colorado, Oregon, and Washington.*

ABOUT THE AUTHORS

Allison M. O'Neil
Partner
Boston
617-239-0729
allison.oneil@lockelord.com

Allison M. O'Neil's practice includes employment law, commercial litigation and white collar criminal defense. Allison has extensive experience in the litigation of employment issues, business torts, contract disputes, and fiduciary duty claims arising in closely-held companies and partnerships. Allison is experienced at conducting complex internal investigations and advising publicly-traded companies on FCPA matters. She has briefed and argued cases in the Massachusetts Appeals Court and the Supreme Judicial Court of Massachusetts. Allison has experience in crisis management and media and government relations. Her clients include businesses, executives, and professionals in financial services and other regulated industries.

David S. Szabo
Partner
Boston
617-239-0414
david.szabo@lockelord.com

David S. Szabo is Co-Chair of the Health Care practice, a Partner in the Corporate and Transactional Department, and a member of the Privacy group. He represents hospitals, integrated delivery systems, physician organizations, home care companies, and other healthcare service providers. He also represents healthcare information technology companies and health plans. David has extensive experience in healthcare licensing and regulation, reimbursement, fraud and abuse compliance matters, and the structuring of joint ventures. He regularly advises clients on Stark Law and Anti-Kickback compliance matters. His practice also includes the privacy and information security law applicable to healthcare providers, health plans, technology vendors, and other organizations. He advises non-profit organizations on general corporate matters, tax, and governance issues.

Katherine A. Guarino
Associate
Boston
617-239-0152
katherine.guarino@lockelord.com

Katherine A. Guarino is an associate in the Litigation Department. She represents businesses, higher education institutions, and individuals in a wide variety of complex civil litigation. Katherine's practice principally involves the representation of colleges, universities and independent schools in connection with breach of contract, torts, intellectual property, real estate and other claims. Ms. Guarino also conducts advisory work for education clients outside of litigation, principally on issues relating to faculty and staff employment matters; at-risk students; and compliance with federal and state anti-discrimination, privacy, campus security and other laws. In addition, Ms. Guarino drafts legislation and initiative petitions and provides legal guidance in the areas of conflict of interest, gaming, and campaign finance.